No. 20982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, CHAIM I. ETNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN; JUDA GLASNER, OSHER ZILBERSTEIN and CHAIM I. ETNER, doing business as the UNITED ORTHODOX RABBINATE OF GREATER LOS ANGELES, UNITED ORTHODOX RABBINATE OF GREATER LOS ANGELES, A. M. BAUMAN and JACOB ADLER,

Appellees.

APPELLANT'S CLOSING BRIEF.

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TABLE OF AUTHORITIES CITED

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Preliminary Statement.

On a judgment entered in favor of the defendants in this cause following an order of the court that the amended complaint failed to state a claim upon which relief could be granted to plaintiff for violation of his civil rights (42 U.S.C.A. 1983, *et seq.*) plaintiff filed his appeal and submitted his Opening Brief on August 17, 1966.

On September 8, 1966 the defendant Juda Glasner filed his respondent's brief.

On September 8, 1966 Richard A. Perkins the attorney for the appellee Chiam I. Etner wrote to the Clerk of the United States Court of Appeal stating that

he would file no brief in behalf of the appellee Etner but in lieu thereof would adopt the brief heretofore filed by the other appellees.

On September 28, 1966 Mr. Phill Silver the attorney for United Orthodox Rabbinate of Greater California submitted a statement that because of stress of business he was unable to file his appellee's brief within the allotted time and requested an extension to October 27, 1966 to file his appellee's brief, which request was granted. On November 20, 1966 Mr. Phill Silver wrote to the Clerk of the court stating that he would file no brief on behalf of the appellee United Orthodox Rabbinate and requested permission to adopt the brief of the appellee Glasner "In so far as it may be applicable to co-defendant, United Orthodox Rabbinate." Nothing is stated about the brief for the appellees Bezlial Orlansky, Neptali Friedman, Osher Zilberstein, and A. M. Bauman who are also represented by attorney Phill Silver [Tr. p. 29], and presumably they also are not interested in submitting an independent appellee's brief.

In any event the only appellee's brief before this court in this cause is the one interposed by the appellee Juda Glasner and appellant answers it accordingly.

I.

Regarding the Right of the Plaintiff David Erlich to Maintain the Present Action.

The trial court in holding that Erlich's amended complaint failed to state a claim upon which relief could be granted, held that the injury done by the defendants, if any, was done to the West Coast Poultry Company, a California corporation and not to plaintiff as an in-

dividual. [Tr. pp. 35-36.] Appellant Erlich in his opening brief argued that the conduct of the appellees was pursuant to a conspiracy to destroy his right to own the property and to deprive him of his right to earn a livelihood for himself and his family, all in violation of the privileges and immunities guaranteed to him by Section I, Article XIV of the United States Constitution. (Op. Br. pp. 10-21.) Appellee does not attempt to answer plaintiff's contentions, but instead argues that Erlich's cause of action is derivative in nature. (App. Br. pp. 11-18.)

On page 12 appellee states:

" 'The fact that a stockholder owns all, or practically all, or a majority of the stock, does not of itself authorize him to sue as an individual.' "; and refers to several authorities in support thereof.

As propositions of law, unquestionably appellee's authorities are correct. But they are not applicable to the present situation where the crux of Erlich's complaint is that the defendants were directing their arrows directly at him as an individual and not to the corporation. Glasner makes no attempt to explain why, if in the performance of his duties as Kosher Food Law Inspector he was concerned with a violation of California Penal Code, Section 383(b) by the West Coast Poultry Company, a California corporation, he lodged a criminal complaint against David Erlich personally, rather than against the corporation. In California a corporation may be charged with a crime. (Cal. Penal Code, Sec. 7.) If West Coast Poultry Company, a California corporation was violating California Penal Code, Section 383(b), why was it neceessary to file criminal complaints against employees of the corpora-

tion, rather than the corporation itself. [Tr. pp. 4-5.] If West Coast Poultry Company, the corporation was the violator, why was it necessary for the defendants to solicit Sam Salter and John Reyna to testify falsely against Erlich. [Tr. p. 5, para. g.]

Thus it is crystal clear that David Erlich was the object of defendant's aggressive action, and not the corporation; and that when the corporation was assailed it was done only with the purpose of injuring Erlich, and not molesting the corporate entity. Since Erlich, and only Erlich, was the direct and only objective of the defendant's conduct, they should not be permitted to escape liability for their acts on the misplaced theory that since the only way they could harm Erlich was through the corporation, the corporation was the only injured party.

On page 15 appellee states:

> "Appellant at great length argues that *his* business and *his* right to earn from that business are somehow involved because he and his wife are the sole stockholders and he is president and general manager of the corporation. Nowhere, however, does it appear that appellant himself is engaged in business."

What appellee blithely ignores is that although West Coast Poultry Company is a corporation, it is identified by the public with the plaintiff, and not as a corporate entity separate and apart from the plaintiff. It is to be noted, which appellee evidently does not, that the defendants circulated advertisements in Los Angeles newspapers advising the public not to purchase any of *plaintiff's* Kosher products and not the corporation's. [Tr. p. 3, para b.]

On page 17 of this brief appellee argues that Erlich should not complain because he was the defendant in a criminal action, since every person who is suspected of having committed a crime should not object to charges being filed against him and be required to stand trial as to his innocence. As appellee states:

> "The mere filing of such charges could not have possibly deprived appellant of any civil right."

Appellee ignores the point. Appellant was not charged with a crime because there were facts sufficient to charge him with one, but because he would not retain the rabbinical services of the defendants. [Tr. p. 3, para. VI.] After six weeks of trial on the first charge, the jury found him not guilty in less than an hour. Why then was it necessary to prosecute him a second time for violating Penal Code, Section 383(b) when it was a foregone conclusion that no conviction on the merits could possibly result. Nor should it be overlooked that to obtain a conviction that plaintiff violated Penal Code, Section 383(b) on the second trial, defendants were willing to employ false testimony. [Tr. p. 5, para. g.]

Of course whether the defendants were actually performing their duty, or, as it is alleged in the complaint, conspiring to force the plaintiff to employ the rabbinical services of the defendants and using the civil service position of the defendant Glasner a State employee to coerce the plaintiff into compliance, are questions of fact that should be determined by a trier of fact after an answer is filed (*Attreau v. Morris* (7th Cir. 1966), 357 F. 2d 871, 874.)

II.

Regarding the Immunity of Appellee Glasner, California State Kosher Food Law Representative.

Under his Point II (App. Br. pp. 18-26), Glasner argues that as California State Food Law Representative, he has absolute immunity from prosecution for any violation under the civil rights law. Although appellee does not agree with the decision of the United States Supreme Court in *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, the point is that under the law as it exists today appellee Glasner has no immunity from an action under the Civil Rights law. (App. Op. Br. pp. 8-10 and *United States v. Price* (1966), 383 U.S. 787, 86 S. Ct. 1152.)

Rhodes v. Meyer (8th Cir. 1964), 334 F. 2d 709, cert. den. 1964, 379 U.S. 915, 85 S. Ct. 263 (App. Br. p. 24) merely repeats the oft cited exception that judges, legislators and prosecutors are the only one exempt from suits for violation of the Civil Rights Act. This exception certainly does not include the California State Kosher Food Law Representative.

III.

Regarding Pleading of Conclusions of Law.

As appellee Glasner states, he did not argue that the plaintiff pleaded Conclusions of Law as a basis for dismissing the amended complaint. (App. Br. p. 27.)

As a matter of fact no one did, and the first inkling anyone had that the court considered plaintiff's allegations that his Constitutional rights under the 14th Amendment were violated as Conclusions of Law, was when the court entered its own judgment [Tr. p. 36.]

Appellee adds nothing to support this ruling by the trial court, or that it is correct, and since this point is covered in Appellant's Opening Brief (Appellant's Opening Brief pages 21-22), there is no need for further elaboration.

IV.

Conclusion.

The amended complaint does state a claim upon which relief can be granted. The judgment of the trial court should be reversed and defendants given an opportunity to answer.

Respectfully submitted,

Joseph W. Fairfield and
Ethelyn F. Black,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH W. FAIRFIELD